

1 ACTION BY CEASING INFRINGING ACTIVITY OR ATTEMPTING TO GO
2 AROUND THE PATENT, NO EVIDENCE OF ANY ATTEMPT TO AVOID
3 INFRINGEMENT. THERE WAS SOME TESTIMONY ABOUT SOME FAIRLY CHEAP
4 ALTERNATIVES GOING AS HIGH AS \$800,000, BUT NO EVIDENCE THEY
5 WERE IMPLEMENTED, NO EVIDENCE BY MANAGEMENT OR MR. CROOK OR
6 ANYBODY SAT DOWN AND SAID, WELL, WE'VE GOT THESE IMPLEMENT --
7 OR THESE ALTERNATIVES, BUT IF WE ADOPT THEM, THEY'LL IMPOSE
8 THESE COSTS OR MAKE THIS SERVICE THIS MUCH WORSE OR IT WILL
9 CAUSE OUR VIEWERS THESE PROBLEMS. NO LIKELIHOOD OF ANALYSIS
10 OF, WELL, WE'VE GOT AN 80 PERCENT CHANCE OF PREVAILING ON
11 INVALIDITY, SO WE'VE GOT A -- WE DON'T REALLY NEED TO TAKE
12 THESE EFFORTS. NO COST BENEFIT ANALYSIS, SO AGAIN THIS
13 FAVOR -- THIS FACTOR, I'M SORRY, MAKING A GOOD FAITH EFFORT TO
14 AVOID INFRINGING THE PATENT AT -- TILTS TOWARDS FINISAR.

15 WHETHER DIRECTV TRIES TO COVER UP ITS
16 INFRINGEMENT, NO EVIDENCE OF COVER UPS. THEY KEPT ON WITH THE
17 SAME PROCEDURES THEY ALWAYS USED. THEY TOOK SOME TIME IN
18 GETTING THEIR OPINIONS, BUT THAT'S NOT THE SAME AS A COVER UP.
19 THERE IS NO INDICATION OF HIDING OR DESTROYING DOCUMENTS. TV
20 WAS OUT, AND THAT THEY THEMSELVES -- DIRECTV POINTS OUT, DIDN'T
21 MEAN THAT, YOU KNOW, SET TOP BOXES ARE THERE, BUT CLEARLY
22 LOOKED AT. SO THAT ONE FAVORS DIRECTV.

23 WHETHER DIRECTV WOULD HAVE GONE ON A LEGAL
24 OPINION THAT APPEARED TO BE WELL SUPPORTED AND BELIEVABLE, THE
25 DEvised METHOD IS NOT INFRINGED OR IT WAS INVALID, YES, THERE

1 WAS AN OPINION. IT CAME AFTER THE LAWSUIT WAS FILED. AND NO
2 DISCUSSION OF AN OPINION OR DISCUSSION BY MANAGEMENT OR MR.
3 CROOK EARLIER WHEN THEY FIRST GOT THAT LETTER. SO THERE'S SOME
4 REASONABLE EFFORT ON INFRINGEMENT, BUT NONE ON ANALYSIS AND
5 VALIDITY. SO, THE COURT CONCLUDES THE WILLFULNESS HERE IS NOT
6 THE DIRECT COPYING AND DELIBERATELY STEALING OF IDEAS OR
7 PIRATING OF EMPLOYEES OR SOMETHING LIKE THAT KIND OF
8 WILLFULNESS; BUT CONSIDERING THE FACTORS THAT ARE SUPPOSED TO
9 BE CONSIDERED AND THE ONES THAT ARE SET UP FOR THE JURY, THERE
10 WAS LEGALLY SUFFICIENT EVIDENCE FOR A JURY TO FIND WILLFULNESS.
11 AND SO THE JUDGMENT, AS A MATTER OF LAW, IS DENIED.

12 THE JMOL -- AND OBVIOUSLY BOTH SIDES MOVED TO
13 THAT, AND THAT'S PRETTY CLOSE TO THE ANALYSIS ON ANTICIPATION
14 THAT I JUST GAVE. DIRECTV HAD THE BURDEN BY CLEAR AND
15 CONVINCING EVIDENCE. IT SEEMED THAT THERE WAS A DISCUSSION OF
16 COMBINING REFERENCES AND ESPECIALLY THE MOTIVATION FOR DOING
17 THE COMBINATION WAS NEITHER CLEAR NOR CONVINCING. THE BEST
18 EVIDENCE TO MOTIVATE TO COMBINE WAS PROBABLY WHAT CAME FROM
19 MR. EATON, AND HIS INFERENCE OF WHAT WAS GOING ON WITH VIDEO
20 TEXT. BUT THE JURY IS ENTITLED TO CREDIT HIS DENIAL OF
21 OBVIOUSNESS OVER THE TESTIMONY OF DIRECTV'S WITNESSES, NO REAL
22 ATTEMPT WAS MADE TO USE EATON BY DEFENDANT FOR THAT PURPOSE.

23 THEN WE HAVE THESE SHORTHAND SUMMARIZATION OF
24 STEPS IN THE CLAIM. THAT'S A LITTLE CONFUSION THERE, AND NO
25 REAL SHOWING THAT THESE ANIMATIONS AND SO FORTH WOULD HAVE BEEN

1 OBVIOUSLY SOMEONE SKILLED IN THE ART. AND, YEAH, THE
2 PERFUNCTORY QUESTION IS ASKING IS HE GOING TO TESTIFY WHAT
3 SOMEONE SKILLED IN THE ART BACK THEN SHOULD HAVE KNOWN. BUT
4 IT'S GOT TO BE CLEAR AND CONVINCING, NOT JUST A PERFUNCTORY
5 LOSS OR -- AGAIN, THE COURT FINDS WHEN YOU HAVE A BURDEN OF
6 PROOF THAT CLEAR AND CONVINCING EVIDENCE THERE WAS CONFLICTS IN
7 THE EVIDENCE, AND THERE'S JUST INSUFFICIENT EVIDENCE FOR THE
8 COURT TO CONCLUDE THAT NO REASONABLE JURY COULD HAVE FOUND THE
9 WAY THEY DID ON OBVIOUSNESS. SO THAT JMOL IS DENIED.

10 NEXT WE TAKE A LOOK AT DAMAGES. NOW HERE UNDER
11 35 USC 284, THE COURT MAY ENHANCE DAMAGES UP TO THREE TIMES.
12 AND IN GENERAL WHEN A JURY FINDS WILLFUL ENHANCEMENT, AN
13 ENHANCEMENT OF DAMAGES IS APPROPRIATE. THAT'S SET OUT IN
14 RECORPORATION VERSUS PORTEC INC. CASE, AND WE SEE THAT AT 970
15 FED. 2D. 816, PAGES 826, 827. THAT WAS AGGREGATED ON THE
16 GROUNDS BY THE BACHMAN VERSUS WESTVIEW INSTRUMENTS CASE WITH A
17 NINE FACTOR THAT'S SET OUT IN REED, BUT THAT NINE FACTOR
18 ANALYSIS HAS BEEN APPROVED AFTER MARKMAN IN SUCH CASES, SUCH AS
19 ODETICS VERSUS STORAGE TECHNOLOGY, 185 FED. 3RD. 1259 AT 1274
20 FED. CIRCUIT 1999, SO THE COURT WILL USES THOSE -- THAT
21 NINE-POINT ANALYSIS. AND A LOT OF THIS ISN'T COVERED UNDER THE
22 WILLFULNESS, BUT WHETHER AN INFRINGER DELIBERATELY COPIED THE
23 IDEAS OF ANOTHER, NO EVIDENCE OF THAT. THAT FACTOR TENDS
24 TOWARD DIRECTV. WHETHER THE INFRINGER KNEW -- OR WHETHER THE
25 INFRINGER WHEN HE KNEW OF THE OTHER'S PATENT PROTECTION

1 INVESTIGATED THE SCOPE OF THE PATENT AND FORMED A GOOD FAITH
2 BELIEF THAT IT WAS INVALID OR NOT INFRINGED, AND THIS IS THE
3 SAME ANALYSIS I DID BEFORE IN FACTOR TWO OF WILLFUL ANALYSIS.
4 AND FOR THE SAME REASONS STATED, THIS FACTOR SUPPORTS
5 ENHANCEMENT. THERE WAS SOME INVESTIGATION OVER A LONG PERIOD
6 OF TIME OR RELATIVELY LONG PERIOD OF TIME OF INFRINGEMENT NOT
7 AN INVALIDITY.

8 THE INFRINGER'S BEHAVIOR AS A PARTY TO
9 LITIGATION, BOTH SIDES WORKED HARD TO REPRESENT THEIR
10 INTERESTS, THE COUNSEL PROFESSIONAL ON BOTH SIDES. BOTH SIDES
11 AT VARIOUS TIMES ATTEMPTED TO AVOID OR DELAY DISCLOSURE OF
12 EVIDENCE. BUT THE COURT PERCEIVED THAT NOT AS A BAD FAITH, BUT
13 JUST BASED ON TECHNICAL DECISIONS OF THE LAWYERS, WHICH AS THE
14 COURT MENTIONED IN AN EARLIER RULING IS CONSIDERED IMPORTANT IN
15 PATENT CASES. AND THAT WAS DEALT WITH BY THE EXCLUSION OF
16 LIMITATION OF EVIDENCE. AND SO THIS COURT FINDS THAT THAT
17 FACTOR IN THIS CASE DOESN'T SUPPORT ENHANCEMENT.

18 DEFENDANT'S SIZE AND FINANCIAL CONDITION, BOTH
19 COMPANIES IN THIS CASE ARE LARGE AND WELL-FUNDED. IT'S TRUE
20 DEFENDANTS PROBABLY LARGER THAN FINISAR. NO SHOWING THAT
21 SOMEHOW HANDICAPPED FINISAR OR THAT SOMEHOW DEFENDANT TOOK
22 UNFAIR ADVANTAGE OF THEIR COMBINED SIZE. THE FACT THAT THEY
23 HAVE -- MERELY THE FACT THAT THEY'RE BIG AND HAVE A LOT OF
24 MONEY IS REALLY NOT CONSIDERED A REASON TO IMPOSE ADDITIONAL
25 DAMAGES. AND IT COULD BE, BUT THE AMOUNT OF DAMAGES WE'RE

1 TALKING ABOUT IN THIS CASE, WHAT PEOPLE TALKED ABOUT WAS 79
2 MILLION IS NOT VERY MUCH. I GUESS AS ONE OF MY PARTNERS USED
3 TO SAY: A WHOLE LOT BETTER THAN A POKE IN THE EYE OF A SHARP
4 STICK. WE'RE TALKING ABOUT A LOT OF MONEY HERE; AND YEAH,
5 MAYBE NOT A LOT COMPARED TO 1.6 BILLION. BUT I THINK IT'S
6 IMPORTANT TO GET DOWN TO REALITY. THERE'S A LOT OF MONEY
7 INVOLVED HERE, EVEN FOR A LARGE CORPORATION.

8 THE CLOSENESS OF THE CASE, CLOSENESS OF THE --
9 THE CASE WAS CLOSE ON SEVERAL ISSUES. INFRINGEMENT WASN'T A
10 CLOSE CALL PARTICULARLY IN THE COURT'S VIEW, BUT ANTICIPATION
11 AND OBVIOUSNESS WERE CLOSE. WILLFULNESS FELL SOMEWHERE IN
12 BETWEEN. THIS FACTOR DOESN'T STRONGLY SUPPORT AN ENHANCEMENT
13 OR A MAJOR ENHANCEMENT. THE DURATION OF THE DEFENDANT'S
14 MISCONDUCT, IT'S UNCONTESTED DIRECTV HAS BEEN USING THE METHODS
15 SINCE THE PATENT WAS ISSUED. BUT WHAT'S MORE IMPORTANT THERE'S
16 NO EVIDENCE OF ANY ATTEMPT TO CHANGE AFTER GETTING THE LETTER
17 IN 2004 OR OF ANY ATTEMPT TO DO A REAL RISK ANALYSIS ON AN
18 INFRINGEMENT CLAIM OR COST BENEFIT ANALYSIS OF THE ALTERNATIVE
19 CONTINUING. THOSE WERE JUST WENT ON BUSINESS AS USUAL. NOW,
20 MR. CROOK DID SOME THINGS, BUT NOTHING -- NO DISCUSSION OF
21 MANAGEMENT GETTING TOGETHER AND AGAIN DOING A REAL SOLID
22 ANALYSIS OF WHAT WAS GOING ON. SO THIS FACTOR DOES SUPPORT
23 SOME ENHANCEMENT. THE REMEDIAL ACTION BY THE DEFENDANT, AFTER
24 THE 2004 LETTER THERE WAS NONE. SO, THIS FACTOR WOULD SUPPORT
25 ENHANCEMENT.

1 DEFENDANT'S MOTIVATION FOR HARM, NO EVIDENCE OF
2 A DELIBERATE PLAN TO HARM FINISAR. DIRECTV WAS OPERATING
3 BEFORE PATENT WAS ISSUED. THIS FACTOR DOES NOT SUPPORT
4 ENHANCEMENT. WHETHER DEFENDANT ATTEMPTED TO CONCEAL ITS
5 CONDUCT, NO ATTEMPT BY DIRECTV TO CONCEAL WHAT THEY WERE DOING.
6 SO THAT ONE GOES IN DIRECTV'S FAVOR.

7 NOW THE POLICY OF SECTION 284 IS TO FULLY
8 COMPENSATE PLAINTIFF AND TO REMOVE ANY INCENTIVE TO INFRINGE IN
9 THE HOPE THAT THE ONLY DOWNSIDE IS GOING TO BE A JUDGMENT THAT
10 MERELY IMPOSES A REASONABLE ROYALTY. THAT POLICY IS DISCUSSED
11 IN A LOT OF THE AUTHORITIES AND IN SOME OF THE CASES. SO YOU
12 GOT A CASE OF CLEAR WILLFUL -- IN THAT CASE OF A CLEAR, WILLFUL
13 INFRINGEMENT AND THERE IS LOW ACTUAL DAMAGES, AN AWARD UP TO
14 THREE TIMES MIGHT FULLY IMPLEMENT CONGRESS'S POLICY TO DETER
15 INFRINGEMENT TO FULLY COMPENSATE THE INVENTOR. IT CAN'T
16 REASONABLY BE ARGUED WHERE THERE'S NO COPYING OR STEALING OF
17 IDEAS AND NO ABUSE BY THE INFRINGER THAT WHERE INFRINGERS
18 ARE -- FOR EXAMPLE, \$400 MILLION OVER THE TIME OF THE
19 INFRINGEMENT AND THE DAMAGE AWARD, FOR EXAMPLE, THE JURY COME
20 BACK WITH, SAY, A BILLION DOLLARS -- NEITHER OF THOSE NUMBERS
21 ARE WHAT WAS ASKED FOR IN THIS CASE -- IF SOME KIND OF BLIND
22 DOUBLING OR TREBLING WOULD BE ANYTHING BUT AN UNJUSTIFIED
23 TRANSFER OF WEALTH. SO, THE COURT HAS TO CONSIDER NOT JUST
24 PERCENTAGES OF HOW MUCH ENHANCEMENT THERE WOULD BE, BUT THE
25 ABSOLUTE DOLLARS INVOLVED. IT'S EASY TO SAY I'LL JUST DOUBLE

1 IT. WELL, AT THE \$100,000 LEVEL, THAT'S ONE THING. AT THE \$79
2 MILLION LEVEL, THAT'S SOMETHING ENTIRELY DIFFERENT. THERE HAS
3 TO BE SOME CAREFUL ANALYSIS OF THAT. WE HAVE SUBSTANTIAL
4 DAMAGES AWARD BY THE JURY. ON THE OTHER HAND, DIRECTV'S
5 METHODS RESULTS IN SUBSTANTIAL REVENUE. EVEN THOUGH IT HAS
6 SUBSTANTIAL COSTS, WHICH RESULTS IN A HEALTHY PROFIT AND LIKELY
7 GOING TO BE EVEN MORE PROFITABLE IN THE FUTURE.

8 IF YOU HAVE A JURY FINDING OF WILLFULNESS, THE
9 COURT IS SAID BY LEGAL AND SUFFICIENTLY EVIDENCE, YOU HAVE
10 UNEXPLAINED DELAY IN INVESTIGATION OF AND CONSIDERATION OF
11 INFRINGEMENT, AND MORE IMPORTANTLY, INVALIDITY, GREAT DEAL OF
12 INCOME, ALTHOUGH ACCOMPANIED BY A VERY HIGH COST OPERATION. SO
13 THE COURT IS FACED WITH IMPLEMENTING THE TWIN POLICIES OF
14 DETERRING INFRINGEMENT, ESPECIALLY WILLFUL INFRINGEMENT, FULLY
15 COMPENSATING FINISAR FOR USE OF ITS INVENTION DESCRIBED IN THE
16 SEVEN CLAIMS IN ISSUE.

17 SO, BASED ON ALL OF THAT, THE COURT IS GOING TO
18 ORDER AN ENHANCEMENT AND FIND AN ENHANCEMENT IS REASONABLE IN
19 THIS CASE BASED ON THE FACTORS THAT THE -- THE COURT HAS JUST
20 SET OUT OF \$25 MILLION. AND THAT'S A LITTLE BIT MORE THAN
21 30 PERCENT OF THE DAMAGES FOUND BY THE JURY. BUT AGAIN, IT'S
22 NOT -- AS I SAID BEFORE, I'M NOT DOING THIS ON JUST A BLIND
23 PERCENTAGE BASIS. I'M TRYING TO LOOK AT THE TOTAL ABSOLUTE
24 NUMBERS ALSO ON THAT.

25 NOW, THE NEXT QUESTION IS UNDER 35 USC, SECTION

1 285, THE COURT CAN AWARD REASONABLE ATTORNEY'S FEES TO THE
2 PREVAILING PARTY IN AN EXCEPTIONAL CASE. THIS IS A TWO-STEP
3 PROCESS. FIRST, THE DISTRICT COURT HAS TO DETERMINE IF THE
4 CASE WAS EXCEPTIONAL. AND HERE THE PREVAILING PARTY HAS THE
5 BURDEN OF PROOF BY CLEAR AND CONVINCING EVIDENCE. THAT'S SET
6 OUT IN PERRICONE VERSUS MEDICIS PHARMACEUTICAL COMPANY, 432
7 FED. 3RD. 1368 AT 1380, FIFTH CIRCUIT 2005.

8 AFTER DETERMINING THE CASE IS EXCEPTIONAL,
9 DISTRICT COURT HAS TO DETERMINE WHETHER ATTORNEY'S FEES ARE
10 APPROPRIATE. WE SEE THAT ALSO IN THE PERRICONE CASE AND IN THE
11 CYBER CORPORATION VERSUS FAX TECHNOLOGIES, 138 FED. 3RD. 1448,
12 PAGE 1460, FIFTH CIRCUIT 1998. NOW, THAT THEY'RE SERIOUSLY
13 DECLARING A CASE EXCEPTIONAL AND WITH WILLFUL INFRINGEMENT, BAD
14 FAITH, LITIGATION MISCONDUCT, UNPROFESSIONAL BEHAVIOR. YOU SEE
15 THAT AT NQ VERSUS C CHANGE. THAT'S AT 436 FED. 3RD 1317-1319,
16 FIFTH CIRCUIT 2006. AND THEN OTHER CRITERIA INCLUDE THE DEGREE
17 OF CULPABILITY, CLOSEST TO THE QUESTIONS, LITIGATION BEHAVIOR,
18 AND OTHER FACTORS WHERE FEE SIFTING MAY SERVE AS INSTRUMENT OF
19 JUSTICE. SEE THAT IN NATIONAL PRESTO INDUSTRIES, INC., VERSUS
20 WEST BEND COMPANY, 76 FED. 3RD, 1185, 1197, FIFTH CIRCUIT 1996
21 AND ALSO BROOK TREE VERSUS ADVANCED MICRO DEVICES, INC., 977
22 FED. 2ND. 1555, PAGE 1582, FIFTH CIRCUIT 1992.

23 AND THE COURT LOOKS AT THE S. C. JOHNSON & SON,
24 INC., VERSUS CARTER WALLACE, INC., TALKING ABOUT PAGE 781 FED.
25 2ND. 198, PAGE 201, FIFTH CIRCUIT 1986. WELL, THAT'S NOW

1 GOING TO BE AN OLDER CASE. EVEN AN EXCEPTIONAL CASE DOESN'T
2 REQUIRE IN ALL CIRCUMSTANCES TO BE AWARDED ATTORNEY'S FEES, AND
3 THEY GOING OVER SOME FACTORS THERE. LOOKING AT FACTORS -- AND
4 ALTHOUGH THEY'RE VERY SIMILAR TO ONES WE'VE ALREADY LOOKED AT
5 ON EXCEPTIONALS. TAKE A LOOK AT THE CLOSENESS OF THE CASE,
6 AGAIN AS THE COURT HAD SAID, CLOSE ON SEVERAL ISSUES, NOT ON
7 INFRINGEMENT PERHAPS, BUT ON ANTICIPATION OBVIOUS, WILLFULNESS
8 IS SOMEWHERE IN BETWEEN. THIS FACTOR ISN'T STRONGLY IN SUPPORT
9 OF ATTORNEY'S FEES. IT'S GENERALLY ACCEPTED IN THE UNITED
10 STATES USING THE AMERICAN RULE, COURTS SHOULDN'T ABROGATE THE
11 AMERICAN RULE AND SHIFT ATTORNEY'S FEES IN CASES WHERE THERE
12 ARE POTENTIALLY VALID AND HARD-FOUGHT ISSUES. JUST BECAUSE YOU
13 LOSE DOESN'T MEAN YOUR ATTORNEY'S FEES SHOULD GO AGAINST YOU
14 ABSENT A STATUTE.

15 LITIGATION BEHAVIOR, AS I'VE SAID, BOTH SIDES
16 WORKED HARD TO REPRESENT THEIR CLIENT'S INTERESTS. THE
17 COUNSEL, I THOUGHT, WERE PROFESSIONAL. AGAIN, THERE WAS DELAYS
18 TRYING TO -- ATTEMPTS TO AVOID DISCLOSURE, AND THE COURT
19 PERCEIVED THAT AS TACTICAL, NOTHING EXCEPTIONAL, ATTORNEYS
20 MAKING TACTICAL CHOICES AND THE PREJUDICE DEALT WITH BY THE
21 COURT'S RULING ON LIMITING OR EXCLUDING EVIDENCE. THIS DOESN'T
22 SUPPORT SHIFTING THE BURDEN ON ATTORNEY'S FEES. THE CONDUCT OF
23 THE PARTIES, YOU KNOW, THIS HAS BEEN ANALYZED ABOVE.
24 PREVIOUSLY NO INDICATIONS DELIBERATE COPYING, NO THEFT OF
25 SECRETS, NO INDUCING EMPLOYEES TO COME OVER TO DIRECTV.

1 HANDLING OF THE SUIT WAS NOT PARTICULARLY EXCEPTIONAL IN A
2 COMPLICATED CASE LIKE THIS, ESPECIALLY GIVEN THE AMOUNT OF
3 MONEY INVOLVED. THIS DOESN'T SUPPORT A FINDING THE CASE WAS
4 EXCEPTIONAL.

5 CULPABILITY OF INFRINGER, YES, DIRECTV INFRINGED
6 ON SEVEN CLAIMS OF THE PATENT. BUT THEY HAD A GOOD DEFENSE ON
7 INDEFINITENESS ON OTHERS. OTHER CLAIMS ARE NOT INFRINGED AT
8 ALL. THEY WERE SLOW TO RESPOND, THE 2004 LETTER FROM FINISAR,
9 BUT AGAIN THE COMPANY WAS IN TURMOIL. THE LAW FIRM WENT
10 THROUGH A CHANGE. CONGRESS WENT OUT OF ITS WAY IN SECTION 285
11 TO REQUIRE CASES TO BE EXCEPTIONAL. SO EVERY INFRINGER IS NOT
12 ENTITLED -- INTENDED TO PAY ATTORNEY'S FEES. AND SO THIS
13 FACTOR HERE ON THE CULPABILITY OF INFRINGER GIVEN THAT IT'S NOT
14 EXTENSIVE OR NO MORE THAN OTHER PEOPLE FOUND INFRINGING DOESN'T
15 SUPPORT A FINDING OF EXCEPTIONALNESS OR AWARD.

16 WILLFUL INFRINGEMENT, THIS WAS FOUND BY THE
17 JURY. AND THIS IS A FACTOR THAT WOULD SUPPORT AN AWARD OF
18 ATTORNEY'S FEES, BUT AS NOTED HERE THE WILLFULNESS IS NOT A
19 DELIBERATE COPYING OR POACHING OF EMPLOYEES TALENTS, SUPPORT IS
20 NOT AS STRONG AS IT MIGHT BE IN SOME CASES. THEN THE COURTS
21 LOOK AT OTHER FACTORS. FINISAR PREVAILED, NOT ON EVERY CLAIM.
22 ONLY SEVEN CLAIMS WERE FOUND TO BE INFRINGED, MANY HELD TO BE
23 INDEFINITE. AND WHILE THERE IS OVERLAP IN THE FACTORS USED TO
24 DETERMINE EXCEPTIONALNESS AND ENHANCEMENT, THEY HAVE TO BE
25 ANALYZING BY THE POLICY REASONS BEHIND 284 AND 285.

1 ENHANCEMENT OF 284, COURT IS TRYING TO PUT THE PATENT HOLDER IN
2 POSITION IT WOULD HAVE BEEN ABSENT INFRINGEMENT TO DETER OTHERS
3 FROM INFRINGING. BUT YOU'VE GOT ENHANCEMENT, YOU'VE GOT
4 PREJUDGMENT INTEREST AND COST TO ACCOMPLISH THIS.

5 CONGRESS WANTED MORE IN DECIDING ATTORNEY'S FEES
6 UNDER 285. THEY COULD HAVE LEFT OUT THE WORD "EXCEPTIONAL."
7 THEY COULD HAVE HAD A C15 PROVISION LIKE IN THE CIVIL RIGHTS
8 ACT CASES WHERE BASICALLY IT'S PRETTY WELL ASSUMED IF YOU WIN A
9 CIVIL RIGHTS CASE, YOU GET ATTORNEY'S FEES. WE'VE GOT A PATENT
10 CASE LIKE THIS WORTH MILLIONS, PERHAPS BILLIONS AT STAKE
11 BETWEEN WELL-FUNDED CORPORATIONS. UNLIKE THE CIVIL RIGHTS
12 CASES WHERE YOU'RE TRYING TO ENCOURAGE PRIVATE ATTORNEYS
13 GENERAL TO TAKE ON UNPOPULAR AND DIFFICULT CASES, PROBABLY NOT
14 MUCH OTHER THAN THE RAW DIFFICULTY OF FLAUNTING THE LAW, NOT
15 REALLY A NEED TO ENCOURAGE ATTORNEYS TO TAKE ON THIS CASE FOR
16 THE SOCIAL GOOD.

17 SO FOR THESE REASONS, THE COURT FINDS THE CASE
18 IS NOT EXCEPTIONAL UNDER SECTION 285. ATTORNEY'S FEES ARE NOT
19 GOING TO BE AWARDED. JUDGMENT IS GOING TO BE AS THE JURY
20 AWARDED, \$78,720,250 -- I'M SORRY, \$78,720,250.25 WITH
21 PREJUDGMENT INTEREST. AND THEN TAKING A LOOK AT THAT, THE
22 COURT NOTES THAT THE PARTIES HAVE AGREED THAT A SIX PERCENT
23 RATE SET OUT BY THE STATE OF TEXAS IS APPROPRIATE. OBVIOUSLY,
24 IN A FEDERAL CASE THE COURT IS NOT BOUND BY THAT. IT COULD
25 HAVE GONE AS HIGH AS -- THE PRIME RATE COULD HAVE BEEN DOWN TO

1 THE T BILL RATE, ALL KINDS OF RATES TO USE. BUT IT DOES SEEM
2 THAT -- AND IN LIGHT OF THE DECISION, THE COURT -- AND THE
3 EVIDENCE IS GOING TO MAKE IT, IT DOES SEEM THAT THE
4 CALCULATIONS ON A PER SET TOP BOX METHOD AS SET OUT AT THE SIX
5 PERCENT RATE, AND IT ALSO DOES APPEAR SINCE THE IDEA HERE IS TO
6 COMPENSATE THE PLAINTIFF FOR THE LOSS OF THE USE OF THE MONEY,
7 THAT IT SHOULD BE COMPOUNDED ANNUALLY.

8 SO IT WILL BE AT THE SIX PERCENT RATE. IT WILL
9 BE BASED ON THE AMOUNT AWARDED BY THE JURY AS SHOWN HERE ON
10 THE -- AND I CAN'T QUITE TELL FROM THESE EXHIBITS EXACTLY HOW
11 IT'S WORKING. BUT WHAT I WANTED IS THAT BASED ON THE SET TOP
12 BOX CALCULATION COMPOUNDED ANNUALLY AS SHOWN IN THESE VARIOUS
13 EXHIBITS THAT BOTH SIDES SEEM TO HAVE ON SHOWING THE AMOUNTS
14 PER YEAR, WHICH IF I'M UNDERSTANDING THIS CORRECT OR CORRECTLY
15 IS GOING TO WORK OUT -- BUT I MAY HAVE TO DO SOME RECALCULATION
16 OF IT. I THINK IT'S VARIOUS FIGURES ON HERE WAS 11 MILLION, 14
17 MILLION, 13 MILLION. THERE MAY HAVE TO BE SOME RECALCULATION
18 OF IT, BUT IT WILL BE BASED ON THE -- THE SALES SHOWN EACH
19 PERIOD, BUT THEN COMPOUNDED ANNUALLY.

20 MR. ROBERTS: YOUR HONOR, JUST TO SEE IF I'M
21 CORRECT, I BELIEVE YOU MISSPOKE WHEN YOU RECITED THE JURY'S
22 VERDICT. I THINK YOU SAID 720,000 WHEN IT WAS 920,000.

23 THE COURT: I MAY HAVE DONE THAT. YOU'RE RIGHT.
24 \$78,920,250.25. THANK YOU. I FIGURED BY NOW YOU-ALL WOULD BE
25 ASLEEP. OKAY. PLUS, THERE'LL BE AN ENHANCEMENT THAT THE COURT

1 EARLIER STATED OF THE 25 MILLION, AND THEN POST JUDGMENT
2 INTEREST ON ALL OF THAT AT THE STATUTORY RATE UNDER, I BELIEVE,
3 IT'S 28 USC, SECTION 1961.

4 THE NEXT ISSUE WE GET INTO IS WHETHER OR NOT
5 THERE SHOULD BE AN INJUNCTION. AND THERE WAS SOME INDICATION,
6 DISCUSSION ABOUT ALL THE DIFFICULTIES IN FIGURING OUT THESE
7 DAMAGES AND WHETHER THERE SHOULD BE AN INJUNCTION AND SO FORTH.
8 BUT THE SCHEDULING ORDER MADE IT CLEAR THAT DAMAGES DISCOVERY
9 WAS SUPPOSED TO HAVE BEEN DONE EARLIER. OBVIOUSLY WHETHER OR
10 NOT THERE SHOULD BE AN INJUNCTION OR A COMPULSORY LICENSE OR
11 WHATEVER IS SOMETHING THE PARTIES KNOW ABOUT IT, AND THE COURT
12 SEES IN THIS CASE GIVEN THE AMOUNT OF EVIDENCE, IT HAS NO
13 REASON TO BELIEVE THAT AT SOME FUTURE DATE -- I THINK I CAN
14 MAKE THAT DECISION NOW.

15 NOW 35 USC, SECTION 283 PROVIDES THAT THE COURTS
16 HAVING JURISDICTION, CAN GRANT INJUNCTION AND, OF COURSE, THE
17 PRINCIPLES OF EQUITY. AND THE EBAY CASE WITH EBAY, INC.,
18 VERSUS MERCEXCHANGE, 126 SUPREME COURT 1837, THE SUPREME COURT
19 HAS SAID LET'S GO BACK TO THE -- WE WILL GO BACK TO THE
20 STANDARD FACTORS. IN GOING THROUGH THESE, WE HAVE IRREPARABLE
21 INJURY. THE EVIDENCE INDICATES TO THIS COURT THAT THERE IS
22 REALLY NO IRREPARABLE INJURY TO THE PLAINTIFF. THEY HAVE
23 RAISED THIS ARGUMENT OF THE RIGHT TO EXCLUDE EVERYBODY ELSE,
24 AND THAT THAT PERHAPS COULD BE PRICELESS AND SHOULD BE PART OF
25 THE CONSIDERATION. BUT IT'S ALSO UNCONTESTED THEY NEVER SOLD

1 THE RIGHTS TO THE PATENT, NEVER MADE THE SLIGHTEST EFFORT TO
2 EVER USE THE PATENT. WITH NO SUCCESS AT ALL IN THE PAST, IT'S
3 A LITTLE FAR FETCHED TO SAY THEY CAN SELL EXCLUSIVE RIGHTS TO
4 COMPETITORS WHO WEREN'T INVOLVED IN THE SUIT. IT'S EASY -- AND
5 YES, AS A PRACTICAL MATTER HAVING THIS VERDICT IS HELPFUL, BUT
6 THIS JUDGMENT DOESN'T DECLARE -- AND AS FAR AS I KNOW DISTRICT
7 COURTS DON'T DECLARE PATENTS VALID FOR ALL PURPOSES FOR EVEN
8 THE NEXT CASE. WE KNOW THAT IN THIS CASE, THE PLAINTIFF PROVED
9 BY A PREPONDERANCE OF THE EVIDENCE THAT DIRECTV INFRINGES SEVEN
10 CLAIMS. AND WE KNOW THAT DIRECTV FAILED TO PROVE INVALIDITY BY
11 CLEAR AND CONVINCING EVIDENCE. THAT GIVES FINISAR AN ENHANCED
12 BARGAINING POSITION. BUT IT'S NOT AN AUTOMATIC TICKET TO CASH
13 IN ON THE PATENT WITH OTHERS OR TO EXCLUDE EVERYONE.

14 AND THE COURT HAS TO BE A LITTLE CONCERNED ABOUT
15 THIS IDEA OF EXCLUSION IN A FIELD WHERE THERE ARE TWO
16 COMPETITORS. AND THEN TAKING IN MIND CONGRESS THROUGH THE
17 ANTI-TRUST LAW HAS INDICATED AN AVERSION TO MONOPOLY,
18 ESPECIALLY A MONOPOLY THAT AFFECTS SO MANY PEOPLE. AND IF THE
19 COURT WAS TO GRANT AN INJUNCTION, YES, MAYBE SOMETHING COULD BE
20 WORKED OUT; BUT FOR WHATEVER PERIOD THE INJUNCTION WAS IN
21 PLACE, YOU'D HAVE ONE COMPANY AS THE SOLE SATELLITE PROVIDER.
22 AND IT'S ALSO GOT TO BE RECOGNIZED IN ANTI-TRUST LAW, WHICH THE
23 COURT IS FAMILIAR WITH, KIND OF DEPENDS ON WHAT ADMINISTRATION
24 IS PUSHING IT. SOME ADMINISTRATIONS PUSH HARDER THAN OTHERS.
25 WHO THE ATTORNEY GENERAL OF THE COUNTRY -- WHAT FOCUS THEY WANT

1 TO MAKE ON IT. BUT CONGRESS HAS THAT ACT IN PLACE. IT DOES
2 SEEM PERHAPS IMPRUDENT FOR A DISTRICT COURT TO SIMPLY DECIDE
3 THAT IT'S GOING TO ISSUE AN INJUNCTION THAT RESULTS IN A TOTAL
4 MONOPOLY OF SOMETHING LIKE SATELLITE TV FOR THE NATION.

5 AND IN TERMS OF IRREPARABLE INJURY, GIVEN THE
6 FACT THAT THERE ARE DAMAGES AVAILABLE AND FUTURE DAMAGES
7 AVAILABLE, IT DOESN'T SEEM IRREPARABLE.

8 REMEDIES AT LAW, FINISAR HAS GOT THE JUDGMENT
9 FOR THE FULL AMOUNT FOUND BY THE JURY, PLUS PREJUDGMENT
10 INTEREST, PLUS A SUBSTANTIAL ENHANCEMENT, PLUS COST OF COURT
11 WHICH THE COURT IS GOING TO AWARD, ALSO. IT'S HARD TO ARGUE
12 THAT IT'S NOT BEEN FULLY COMPENSATED FOR DAMAGES TO DATE. AND
13 THEN AS TO FUTURE, THE COURT IS GOING TO FIND A COMPULSORY
14 LICENSE TO ADEQUATELY COMPENSATE FINISAR FOR DIRECTV'S USE OF
15 THE INVENTIONS, ESPECIALLY SINCE FINISAR EVIDENTLY NEVER HAD
16 THE WILL NOR THE MEANS TO IMPLEMENT THE PATENT ITSELF.

17 SO, HARDSHIP, THE HARDSHIP INVOLVED IN ENJOINING
18 DIRECTV WOULD BE ENORMOUS. YES, IT'S TRUE THAT YOU CAN'T
19 REALLY CONSIDER YOURSELF TOO MUCH ABOUT PROFITS TO
20 CORPORATIONS. IF YOU'VE GOT A THOUSAND EMPLOYEES, THOUSANDS OF
21 EMPLOYEES OUT OF WORK, RIPPLE EFFECT ON ALL THE CONTENT
22 PROVIDERS PROBABLY INCALCULABLE. 15 MILLION PEOPLE LOSE THE
23 AVAILABILITY TO VIEW THEIR TV. SOME WOULD SAY THIS IS A
24 BLESSING, AND ONE OF THE BRIEFS SAID SOMETHING ABOUT THAT. BUT
25 IT'S NOT A BLESSING TO INVALIDS OR SHUT-INS OR MILLIONS OF

1 RURAL PEOPLE WHO DEPEND ON TV FOR NEWS AND EVERYTHING ELSE. ON
2 THE OTHER HAND, FINISAR IS HARD PRESSED TO SHOW A HARDSHIP IN
3 RECEIVING OVER A \$100 MILLION FROM A PATENT WHICH HAS BEEN ON A
4 SHELF FOR SOME TEN YEARS WITH NO RETURN AT ALL, ESPECIALLY WHEN
5 THERE HASN'T BEEN A PENNY INVESTED IN ITS DEVELOPMENT OR
6 IMPLEMENTATION AFTER ISSUANCE ACCORDING TO -- ACCORDING TO THE
7 EVIDENCE. AN APPROPRIATELY WORDED COMPULSORY LICENSE COULD
8 CONTINUE THE FLOW OF INCOME AND STILL ALLOW FINISAR TO MARKET
9 THE PATENT NOW, AND IT HAS THE ANTI-BARGAINING TOOL OF THE JURY
10 VERDICT AND JUDGMENT.

11 AND THEN AS FAR AS PUBLIC INTERESTS, THE COURT
12 CAN'T SEE ANY PUBLIC INTEREST SERVED BY ENJOINING DIRECTV. THE
13 PUBLIC POLICY OF THE TERM INFRINGEMENT HAS FOR REASONS
14 PREVIOUSLY DISCUSSED AND ADDRESSED BY THE MONEY JUDGMENT.
15 THERE'S NO PUBLIC INTEREST IN ARBITRARILY LIMITING SATELLITE TV
16 TO MILLIONS OF VIEWERS. THE WHOLE PATENT SYSTEM ITSELF IS A
17 PUBLIC INTEREST IN TECHNOLOGY BEING USED AND IMPROVED UPON. SO
18 THE COURT DOESN'T SEE THAT THERE'S -- PUBLIC INTEREST WOULD BE
19 SERVED BY AN INJUNCTION. SO THE REQUEST FOR AN INJUNCTION IS
20 DENIED.

21 THEN WE GET INTO THE COMPULSORY LICENSE, AND
22 WE'VE HAD A LOT OF TESTIMONY ABOUT THAT TODAY. COMPULSORY
23 LICENSE CAN BE GRANTED TO A PATENTEE WHO'S BEEN UNABLE TO
24 PREVAIL IN A REQUEST FOR INJUNCTIVE RELIEF. AND FOSTER VERSUS
25 AMERICAN MACHINE AND FOUNDRY COMPANY, 492 FED. 2D. 1317, PAGE

1 1324, FED. CIRCUIT. THIS IS -- MAY NOT BE FED. CIRCUIT. IT'S
2 A 1974 CASE. AND THE PLAINTIFF IN THEIR BRIEF ASSERTS THAT
3 AFTER REVIEWING THE GEORGIA-PACIFIC FACTOR, THE COURT SHOULD
4 AWARD A REASONABLE ROYALTY OF THREE PERCENT OF REVENUE.
5 DEFENDANTS CONTEND THAT DAMAGES SHOULD BE A \$1.32 PER SET TOP
6 BOX.

7 THERE SEEMS TO BE SOME DISCREPANCY. SOME OF THE
8 EXHIBITS TALK ABOUT 55-MILLION SET TOP BOXES, BUT I THINK
9 MR. DONALDSON TESTIFIED IN HIS MOST RECENT REPORT IT WAS
10 59-MILLION SET TOP BOXES DURING THE DAMAGE PERIOD, AND THERE'S
11 SOME INDICATION THERE'S LIKELY TO BE 15 MILLION COMING UP THIS
12 COMING YEAR. THE COURT RECOGNIZES THAT THE GEORGIA-PACIFIC
13 FACTORS ARE FREQUENTLY USED IN TERMS OF INSTRUCTING THE JURY ON
14 A REASONABLE ROYALTY IN A HYPOTHETICAL SITUATION IN THE PAST;
15 BUT IT DOESN'T SEE ANY REASON AT ALL WHY THESE SAME FACTORS
16 CAN'T BE USED IN -- TO HELP THE COURT ANALYZING WHAT WOULD BE
17 AN APPROPRIATE ROYALTY AMOUNT. SO LOOKING AT THAT THE
18 ROYALTIES RECEIVED BY THE PATENTEE FOR LICENSING THE PATENT
19 SUIT, THERE HASN'T BEEN ANY ROYALTIES RECEIVED BY THEM IN THE
20 PAST, NONE AT ALL. NO ONE'S TAKEN THEM UP ON IT. THERE WAS
21 SOME TESTIMONY ABOUT UNACCEPTED OFFERS. TO SELL; UNACCEPTED
22 OFFERS, TO BUY. IN THE COURT'S MIND, THAT'S REALLY WEAK
23 EVIDENCE. THE -- WHAT WE HAVE, OF COURSE, IS THE JURY VERDICT,
24 BUT THE JURY DETERMINED WHAT'S IN THE PAST. IT'S A LITTLE
25 DIFFICULT TO FIGURE OUT WHAT THAT WAS. IT SEEMS MOST LIKELY IT

1 WAS ON A SET TOP BOX BASIS. HARD TO BELIEVE THEY WOULD HAVE
2 GONE THROUGH A .14 ROYALTY. REALLY, THAT'S NOT A BIG CONCERN
3 THERE UNDER THE -- UNDER THE GEORGIA-PACIFIC ANALYSIS.

4 THE COURT WOULD INDICATE THAT ITS OPINION THAT
5 THE GROSS REVENUE MODEL IS SOMEWHAT UNWORKABLE BECAUSE IT
6 DOESN'T CONSIDER COST. AND YOU'VE GOT -- ESPECIALLY IN
7 INDUSTRY WHERE IT'S NECESSARY TO HAVE A NUMBER OF DIFFERENT
8 PATENTS TO MAKE THE SYSTEM WORK. YOU'VE GOT THE -- WELL, THE
9 GEM STAR, THE IMPEG, THE DOLBY, WHATEVER GETS INVOLVED IN THE
10 DISH ITSELF, AND THE SET TOP BOX STUFF. THERE'S A LOT OF
11 PATENTS INVOLVED THERE, AND IF EVERY ONE OF THEM HAD, SAY,
12 THERE'S 10 OR 15 OR MORE, A FEW PERCENT OF REVENUE, DIRECTV
13 COULD NEVER RUN A BUSINESS BECAUSE IT HAS NOTHING TO DO WITH
14 COST. AND THIS IS AN INDUSTRY WITH HUGE COSTS, AT LEAST THE
15 BIG NUMBERS.

16 BUT I HEARD NO TESTIMONY THAT SHOWED ME HOW THE
17 ECONOMIC WAS WORKABLE BUT BASE IT ON GROSS REVENUE OR THAT
18 ANYBODY ELSE EVER BASED ON GROSS REVENUE. IT WOULD SEEM TO ME
19 TO BE A VERY FOOLISH BUSINESS DECISION TO DO IT ON THAT WHEN
20 YOU COULD HAVE GROSS REVENUE OF A BILLION DOLLARS A YEAR, BUT
21 COST OF 1.2 BILLION. AND YOU'RE GOING TO GIVE ANOTHER THREE
22 PERCENT OF THAT UP. THAT DOESN'T MAKE -- THAT DOESN'T SEEM TO
23 BE GOOD BUSINESS SENSE. THE COURT HAS TO COME UP WITH
24 SOMETHING ELSE.

25 LOOKING AT FACTOR TWO, THE RATES PAID BY

1 LICENSEE FOR USE OF OTHER PATENTS, COMPARABLE TO THE PATENT
2 SUIT, WE HAVE A RANGE, IMPEG STARTING AT \$4 GOING DOWN TO 2.50
3 BASED ON VOLUME. STARSIGHT, 3.50 TO 5.50 PER BOX. THAT'S A
4 GROUP OF SEVEN PATENTS; THE DOLBY, 12 CENTS TO \$1.65 PER UNIT
5 BASED ON VOLUME; AND THOMPSON, 2.50 PER BOX; GEM STAR, 20 CENTS
6 PER SUBSCRIBER PER MONTH; MACROVISION, THAT ONE IS NOT REALLY
7 RELATED. THAT'S BASED ON INCOME FROM A SPECIFIC THING, NAMELY,
8 PAY PER VIEW MOVIES OR PAY PER VIEW THINGS. SO THAT'S, I
9 THINK, IMPORTANT FACTORS IN THERE LOOKING AT THAT RANGE IN
10 THERE, AND THEN COMPARING THIS PARTICULAR PATENT, WHICH
11 OBVIOUSLY IS IMPORTANT BASED ON THE JURY'S FINDINGS. AND BASED
12 ON THE COURT'S OWN REVIEW OF THE PATENT ITSELF. THAT WOULD
13 SUPPORT A COMPULSORY LICENSE BASED ON A ROYALTY PER SET TOP
14 BOX, ESPECIALLY IN LINE WITH WHAT WE SEE IN THE IMPEG LICENSE
15 WHERE THEY'VE TAKEN CARE OF THE PROBLEM. PLAINTIFFS PROPERLY
16 BROUGHT UP ABOUT WHAT YOU CALL A SET TOP BOX.

17 WELL, EVIDENTLY IT SEEMS THAT THAT WAS BROUGHT
18 UP BEFORE BY OTHER PEOPLE, AND IT DEPENDS ON THE -- I DON'T
19 REMEMBER IF IT WAS ENCODERS OR -- ENCODERS OR TRANSPONDERS.
20 THEY'RE -- I'M SORRY, I'M DRAWING A BLANK ON A WORD, BUT
21 MR. TOUTON BROUGHT THAT UP, AND I ALSO SAW IT IN THE IMPEG
22 LICENSE. SO THAT MAKES A USEFUL FRAMEWORK.

23 THEN WE LOOK AT THE THIRD FACTOR, NATURE AND
24 SCOPE OF THE LICENSE IS EXCLUSIVE OR NONEXCLUSIVE OR RESTRICTED
25 BY TERRITORY OR WITH RESPECT TO WHERE PRODUCTS MAY BE SOLD.

1 NOT GOING TO BE AN EXCLUSIVE LICENSE. OBVIOUSLY, THEY CAN SELL
2 IT TO OTHERS. DOESN'T SEEM TO RESTRICT THEM BY TERRITORY.
3 THAT WOULD INDICATE TO HAVE A LOWER VALUE BECAUSE IT'S NOT
4 EXCLUSIVE, AND IT'S PROBABLY IN VIOLATION OF ANTI-TRUST IF IT'S
5 ACTUALLY COVERED EVERYBODY ELSE TO BE PUTTING RESTRICTIONS ON
6 NOT BEING ABLE TO GO TO ECHOSTAR OR ANYBODY ELSE. THE LICENSOR
7 ESTABLISHED POLICY IN MARKETING PROGRAMS TO MAINTAIN THIS
8 PATENT MONOPOLY BY NOT LICENSING OTHERS TO USE THE PATENT OR BY
9 IMPOSING SPECIAL CONDITIONS SINCE LICENSOR NEVER HAS LICENSED
10 THIS PARTICULAR PATENT, HAS MADE NO ATTEMPTS TO PRESERVE THE
11 MONOPOLY. AND, ACTUALLY, THERE IS TESTIMONY THEY WENT OUT AND
12 TRIED AND TRIED AND TRIED TO SELL IT. NEVER COULD. BUT THEY
13 WEREN'T TRYING TO MAKE IT EXCLUSIVE, AND THEY WEREN'T DOING IT
14 THEMSELVES. THEY WEREN'T TRYING TO MAINTAIN THEIR OWN
15 MONOPOLY. SO THAT FACTOR WOULD TEND TO LOWER THE RATE.

16 THE COMMERCIAL RELATIONSHIP BETWEEN LICENSER AND
17 LICENSEE, ARE THEY COMPETITORS? NO, THEY'RE NOT COMPETITORS.
18 ARE THEY INVENTOR AND PROMOTER? NOT EXACTLY, BUT OBVIOUSLY THE
19 MORE THESE BOXES AND THE BETTER BUSINESS THAT DIRECTV DOES, THE
20 BETTER OFF IT'S GOING TO BE FOR FINISAR, SO THAT AGAIN WORKS
21 SOMEWHAT IN FINISAR'S FAVOR.

22 AND GETTING INTO THE TESTIMONY ABOUT VOLUME,
23 LOWERING THE NUMBER, OBVIOUSLY FINISAR IS GOING TO HOPE FOR
24 HIGHER VOLUME. SO YOU WOULDN'T WANT TO SET THE PRICE SO HIGH
25 THAT YOUR ELASTICITY DEMAND WOULD COME -- WOULD SET IN. YOU

1 DON'T WANT TO SET IT SO LOW THAT THEY'RE NOT REALIZING FULL
2 VALUE.

3 NUMBER SIX, THE EFFECT OF SELLING THE PATENT
4 SPECIALITY AND PROMOTING SALE OF OTHER PRODUCTS OF LICENSEE. I
5 DIDN'T SEE ANY EVIDENCE AT ALL THAT USE OR NONUSE OF THE PATENT
6 IS GOING TO HELP THE CABLE BUSINESS FINISAR IS IN, THE KIND OF
7 BUSINESS THEY ALREADY HAVE ALONG WITH THEIR PATENTS THEY HAVE.
8 THE EXISTING VALUE, THE INVENTIONS, THE LICENSOR, THE GENERATOR
9 OF SALES, THE NONPATENTED ITEMS, DOESN'T SEEM -- NO EVIDENCE OF
10 THAT -- OR EVEN THEIR PATENTED ITEMS DOESN'T SEEM TO HELP. THE
11 EXTENT THAT SUCH DERIVATIVE OR CONVEYED SALES, THAT'S AT ZERO.
12 THAT WOULD TEND TO DRIVE THE VALUE OF THIS DOWN.

13 THE DURATION OF THE PATENT AND THE TERMS OF THE
14 LICENSE, WE'VE TAKEN CARE OF PAST DAMAGES, AND NOW IT GOES UP
15 ANOTHER SIX YEARS. OBVIOUSLY, FINISAR SHOULD BE ENTITLED TO
16 RECEIVE THE FULL VALUE THAT IT HAS.

17 THE ESTABLISHED PROFITABILITY OF THE PRODUCT
18 MADE UNDER THE PATENT, IT'S A COMMERCIAL SUCCESS IN ITS CURRENT
19 POPULARITY. OBVIOUSLY, IT'S POPULAR. WE GOT 15 MILLION
20 VIEWERS.. WE'VE GOT REVENUES DEPENDING ON WHO YOU'RE BELIEVING,
21 VERY, VERY HIGH. PROFITS AGAIN DEPENDING ON WHICH KIND
22 YOU'RE -- OPERATING PROFITS OR OTHER PROFITS, PROFITS ARE QUITE
23 HIGH. OBVIOUSLY, DIRECTV WANTS TO MAINTAIN THOSE. AND IT IS
24 ALSO OBVIOUSLY FINISAR'S -- OR PROFIT IF FINISAR GETS ITS FAIR
25 SHARE. AND THIS, I GUESS, IS ONE REASON WHY THE REVENUE MODEL

1 DOESN'T WORK BECAUSE REGARDLESS OF WHAT IT IS PER SET TOP BOX,
2 DIRECTV AND REGARDLESS OF HOW MANY PATENTS DIRECTV HAS TO BUY
3 PER SET TOP BOX, HE CAN ALWAYS DEAL WITH THAT COST IN ITS FEE
4 STRUCTURE. BUT WHEN YOU'RE DOING IT ON A REVENUE BASIS, IT
5 DOESN'T MATTER HOW YOU RAISE FEES; YOU ALWAYS CREATE MORE
6 PERCENTAGE OF THAT GROSS REVENUE REGARDLESS OF WHAT YOUR COST
7 WERE. AND THAT'S BEEN A -- THAT'S PROBLEMATIC IN THE COURT'S
8 MIND AS TO WHY -- IT'S GOT TO BE BASED ON SOME -- SOME SUM THAT
9 THEN CAN BE DEALT WITH. AND GEM STAR DEALS WITH IT ON A
10 MONTHLY BASIS PER SUBSCRIBER. THAT'S ANOTHER WAY OF DOING IT.
11 AT LEAST YOU'VE GOT A COST THAT'S KNOWN AND THEN CAN BE HANDLED
12 IN YOUR FEE STRUCTURE. BUT FOR ALL THE OTHER TECHNOLOGY, IT
13 DOES SEEM TO BE PER SET TOP BOX.

14 THIS IS A PROFITABLE BUSINESS. AND WHATEVER FEE
15 IS SET CAN BE DEALT WITH. IT DOESN'T -- THERE IS NO INDICATION
16 THAT DEMAND IS INELASTIC BASED ON PRICE OR IN THE RANGE WE'RE
17 TALKING ABOUT HERE. UTILITY AND ADVANTAGE OF THE PATENT
18 PROPERTY OVER THE OLD MODE OF DEVICES, IF ANY, IT WOULD BE
19 USEFUL LOOKING UP SIMILAR RESULTS. NOT MUCH TESTIMONY ABOUT
20 THAT AT ALL OTHER THAN MR. EATON TELETEXT BEING SOMEWHAT
21 SIMILAR AND PERHAPS SOME FURTHER INVESTIGATION IT WOULD BE MORE
22 SIMILAR THAN WHAT WAS BROUGHT OUT. BUT OBVIOUSLY THERE'S SOME
23 UTILITY HERE AS SEEN BY THE SUCCESS OF THE DIRECTV.

24 THE NATURE OF THE PATENT INVENTION, IT'S A
25 METHOD, THE CHARACTER OF THE COMMERCIAL IMBIBEMENT AS OWNED AND

1 PRODUCED BY THE LICENSOR, NONE, THEY HAVEN'T USED IT. THE
2 BENEFITS TO THOSE WHO USED HAVE USED INVENTION, ALREADY GOT THE
3 TESTIMONY IN OF THEIR LARGE REVENUES ALONG WITH HIGH COST, OF
4 COURSE, RESULTING IN A HEALTHY PROFIT.

5 ELEVEN, EXTENT TO WHICH THE INFRINGERS MADE USE
6 OF THE INVENTION. BASED ON THE JURY'S VERDICT, THEY HAVE BEEN
7 USING THAT INVENTION SINCE -- SINCE DAY ONE AND USING IT TO
8 THEIR ADVANTAGE TO GROW A VERY HEALTHY BUSINESS. ANY EVIDENCE
9 PROBATIVE AS TO VALUE OF THAT USE, WE'VE ALREADY GOT THAT IN.
10 THE COURT HAS ALREADY DISCUSSED THAT IN TERMS OF THE REVENUES
11 AND THE PROFITS. THE PORTION OF PROFIT OR THE SELLING PRICE
12 MAY BE CUSTOMARY IN A PARTICULAR BUSINESS OR IN COMPARABLE
13 BUSINESSES TO USE -- FOR THE USE OF THE INVENTION OR ANALOGOUS
14 INVENTIONS, VERY LITTLE TESTIMONY ABOUT THAT. BOTH -- ALL THE
15 EXPERTS WERE BASICALLY SAYING THEY COULDN'T REALLY TELL -- EVEN
16 FINISAR EXPERTS COULDN'T REALLY TELL HOW IMPORTANT THIS WAS.
17 IT WAS IMPORTANT, BUT IS IT MORE IMPORTANT THAN THIS? IS IT
18 MORE IMPORTANT THAN THE SATELLITE, IS IT MORE IMPORTANT THAN
19 IMPEG, IS IT MORE IMPORTANT THAN GEM STAR OR DOLBY OR ANY OF
20 THESE OTHERS? BASED ON THE EVIDENCE BEFORE THE COURT, IF YOU
21 REMOVE ANY ONE OF THESE KEY ITEMS, THE SYSTEM BREAKS DOWN. SO
22 IT'S IMPORTANT, BUT NOT NECESSARILY MORE IMPORTANT THAN THE 200
23 SOME-ODD PATENTS IN THE IMPEG SYSTEM OR THE OTHERS. SO THAT
24 WOULD AGAIN GO TOWARDS KEEPING THE RATE WITHIN THE RANGE
25 DISCUSSED IN ITEM NUMBER TWO, THE RATES PAID BY THE LICENSEE

1 FOR USE OF OTHER PATENTS.

2 THIRTEEN -- FACTOR 13 IS VERY SIMILAR. THE
3 COURT IS GOING TO REALIZE THE PROFIT SHOULD BE CREDITED TO THE
4 INVENTION AS DISTINGUISHED FROM NONPATENTED ELEMENT. THE
5 MANUFACTURING PROCESS, BUSINESS RISK SIGNIFICANT FEATURES OR
6 IMPROVEMENT HEADED BY INFRINGER. I THINK THIS IS IMPORTANT
7 BECAUSE AS MR. DONALDSON AGREED, VERY HIGH COST OF ENTRY,
8 VARIOUS ENTRY IN THIS CASE. LITERALLY BILLIONS OF DOLLARS TO
9 GET INTO THIS BUSINESS. I MEAN, PUTTING UP THREE SATELLITES.
10 THERE WAS A LOT OF TALK ABOUT, WELL, THEY HAVE ON HAND CASH OF
11 SEVERAL BILLION DOLLARS. DEFENDANT NEVER REALLY CAME BACK AND
12 SPENT MUCH TIME ON THAT, BUT THE COURT HAS -- YOU KNOW, AT
13 LEAST NOT DIRECTLY TO THE JURY. BUT THE COST AS BROUGHT OUT
14 WERE ALSO VERY, VERY HIGH. SO HOW MUCH CASH DO THEY HAVE ON
15 TIME AND ONE PARTICULAR TIME IS NOT A KEY HERE, AND NO ONE, I
16 THINK, CAN REASONABLY SAY THAT THIS INVENTION SHOULD BE
17 CREDITED WITH 25 PERCENT OF OR SOME OTHER HUGE PERCENT OF THOSE
18 GROSS REVENUES THAT CAME IN THAT HAVE TO BE INVOLVED IN
19 AMORTIZATION. YOU GOT A SATELLITE UP THERE THAT'S GOING TO
20 HAVE A DECAYING ORBIT. IT SOMETIMES IS GOING TO HAVE TO BE
21 REPLACED. I DON'T KNOW WHAT IT COSTS NOW TO LAUNCH A
22 SATELLITE, BUT IT'S SOMETHING IN A VERY HIGH RANGE. SO YOU
23 TALK ABOUT YOUR REALIZABLE PROFIT. YOU CAN'T JUST BE LOOKING
24 AT TOTAL CASH ON HAND. YOU HAVE TO CONSIDER AMORTIZATION. YOU
25 HAVE TO BE LOOKING AT ONE OF THE PROFIT MEASURES, WHETHER IT'S

1 THE 560 MILLION -- YOU CALL IT OPERATING PROFIT OR THE ONE
2 BILLION SOME ODD DEPENDING ON WHICH YOU LOOKED AT. YOU'RE
3 LOOKING AT THAT. AND AGAIN THE PROBLEMS OF DOING IT BY
4 REVENUE, I'VE ALREADY EXPLAINED. BUT SEEING AS THIS -- IS THIS
5 PATENT SEEMS TO BE COMPARABLE TO SOME OF THE OTHERS IN THE
6 RANGE OF THOSE SEEMS -- SEEMS TO BE PRACTICAL AND JUSTIFIABLE.

7 FINALLY GET TO THE OPINION TESTIMONY OF
8 QUALIFIED EXPERTS, AND THE COURT HAS CONSIDERED THAT. THERE'S
9 OBVIOUSLY A WIDE VARIANCE. I EXPLAINED WHY I DON'T THINK THE
10 USE OF A FACTOR BASED ON REVENUE IS APPROPRIATE. ON THE OTHER
11 HAND, GIVEN THE RATES, FACTOR NUMBER TWO, THE 30 CENTS PER BOX
12 OR EVEN THE 60 CENTS PER BOX IS APPROPRIATE EITHER. BASED ON
13 THE JURY'S VERDICT, THIS IS -- THIS IS INFRINGEMENT, AND BASED
14 ON ALL THE EVIDENCE IT'S AN IMPORTANT PATENT.

15 AND THEN THE LAST FACTOR THAT'S SET OUT IN IN
16 THE GEORGE-PACIFIC CASE IS THE -- WHAT A REASONABLE BUYER WOULD
17 HAVE ACCEPTED IT. BASICALLY WHAT A REASONABLE BUYER WOULD
18 ACCEPT IT OR REASONABLE SELLER WOULD HAVE SOLD FOR OR WHAT THEY
19 WOULD HAVE AGREED UPON AT THE TIME THE INFRINGEMENT BEGAN.
20 BASICALLY THE REASONABLE BUYER, REASONABLE SELLER TEST. HAVE
21 TO LOOK AT THAT. IT'S A LITTLE BIT ARTIFICIAL IN THAT NOW
22 WE'VE ALREADY GOT A JURY VERDICT. BUT AGAIN LOOKING AT WHAT IS
23 COMMERCIALY REASONABLE, FACTOR TWO RAISED -- COMES UP PRETTY
24 HEAVILY.

25 BASED ON ALL OF THAT, THE COURT IS GOING TO IN

1 LIEU OF ENJOINING DIRECTV FROM OPERATING ENTER JUDGMENT THAT
2 THERE WILL BE A COMPULSORY LICENSE AT THE RATE OF \$1.60 PER SET
3 TOP BOX.

4 NOW, TO EXPLAIN, I GUESS, FOR THE HIGHER COURT
5 HOW THE COURT ARRIVES AT THAT, THERE IS EVIDENCE THAT IMPEG,
6 FOR EXAMPLE, IS AT 2.50 NOW BASED ON THE VOLUME BECAUSE IMPEG
7 INVOLVES SOME 200 PATENTS. THE STARSIGHT IS A HIGHER PER BOX,
8 BUT IT HAD ABOUT SEVEN PATENTS RELATED TO THE PROGRAM. DOLBY,
9 WHICH THE COURT'S UNDERSTANDING, WAS BASICALLY A SOUND
10 ENHANCEMENT SYSTEM, HAS A LOWER RATE THAN THE 12 CENTS GIVEN
11 CURRENT VOLUME. BUT THAT'S PROBABLY NOT AS IMPORTANT AS THE
12 METHOD FOR THE ENTIRE SYSTEM. SO PERCEIVING WHAT THE EVIDENCE
13 IS AND WHAT HAS BEEN DONE IN OTHER PATENTS FOR MULTIPLE GROUPS
14 OF PATENTS WHICH SEEM JUST AS IMPORTANT, AND THEN TAKING A LOOK
15 AT THE TOTAL PROFITS THAT WERE ACTUALLY INVOLVED, THE COURT
16 CONCLUDES THAT A REASONABLE ROYALTY OF \$1.60 PER SET TOP BOX
17 GOING INTO THE FUTURE WOULD BE REASONABLE.

18 NOW AN ARGUMENT COULD BE MADE, WELL, THAT SEEMS
19 TO BE MORE THAN WHAT THE JURY DID. WELL, FIRST OF ALL, WE
20 DON'T KNOW WHAT THE JURY DID. SECOND, WE'RE NOT -- EVEN IF YOU
21 MULTIPLY OR DIVIDE IT OUT TO COME UP WITH \$1.32, THAT'S IN THE
22 PAST. A DOLLAR BACK IN 1999 OR WHATEVER ISN'T WORTH AS MUCH AS
23 A DOLLAR TODAY. AND SO THEY'RE LOOKING AT THE PAST; I'VE GOT
24 TO LOOK ON UP TO THE FUTURE. I WILL STATE RIGHT NOW THAT IT'S
25 THE COURT'S INTENT THAT THIS PROBLEM OF SET TOP BOX,

1 ENTERTAINMENT CENTERS AND SO FORTH CONTROLLING MULTIPLE TV'S IS
2 GOING TO BE SUBJECT TO THE SAME KIND OF ACCOUNTING AS IN THE
3 IMPEG LICENSE WHERE IF THAT OCCURS, THEN IT WINDS UP BEING
4 CONSIDERED AS TWO SET TOP BOXES OR THREE SET TOP BOXES. I'M
5 STATING THAT AS MY INTENT BECAUSE I'M NOT SURE IN TERMS OF THE
6 JUDGMENT I CAN CRAFT OUT THE ENTIRE LICENSE AGREEMENT. BUT IF
7 A DISAGREEMENT COMES UP, I WANT BOTH SIDES TO UNDERSTAND THAT
8 THAT'S THE KIND OF THING I'M GOING TO BE LOOKING AT.
9 OBVIOUSLY, THE COURT RETAINS JURISDICTION. IF A PROBLEM COMES
10 UP, I'LL HAVE TO DEAL WITH IT. I'M HOPING THAT WON'T BE
11 NECESSARY, IF YOU'VE GOT AN IDEA OF WHAT MY INTENT IS AT THAT
12 TIME.

13 AGAIN, THE COURT CONSIDERS THAT FINISAR IS THE
14 PREVAILING PARTY AND IS ENTITLED TO COST. RECOVERY OF COSTS IN
15 A FEDERAL SUIT IS SET OUT IN FEDERAL STATUTES. THOSE ARE TO
16 BE, AS ALWAYS, THEY WIND UP BEING SUBMITTED TO THE CLERK OF THE
17 COURT. I MEAN, THE RULE -- COUNSEL ARE WELL FAMILIAR WITH THE
18 RULES ON THAT. COSTS DO NOT INCLUDE ATTORNEY'S FEES. THIS
19 ISN'T A CIVIL RIGHTS CASE. YES, SIR.

20 MR. ROBERTS: ONE POINT OF CLARIFICATION. I
21 KNOW SOME COURTS AWARD EXPERT WITNESS FEES AS PART OF THE COST.
22 OBVIOUSLY THOSE ARE IN PATENT CASE. THE COURT HAS HEARD
23 TESTIMONY ABOUT THE AMOUNT THAT OUR WITNESSES HAVE CHARGED. I
24 THINK IT WAS VERY REASONABLE. WE'D ASK THAT THOSE BE INCLUDED
25 WITHIN THE AWARD OF COST.

1 THE COURT: YOU CAN SUBMIT THAT AND REQUEST
2 THAT. I CAN TELL YOU IN THE PAST CASES I'VE HAD, I'VE NOT
3 AWARDED THAT GENERALLY. PART OF THE ENHANCEMENT IS INTENDED TO
4 PUT PLAINTIFF IN A POSITION IT WOULD HAVE BEEN HAD THERE -- IN
5 OTHER WORDS, HAD INFRINGEMENT NOT OCCURRED OR HAD THE LICENSE
6 BEEN TAKEN. AND THE AMOUNT THAT'S INVOLVED THERE SHOULD COVER
7 THAT. IN OTHER WORDS, IT WAS PRETTY OBVIOUS THAT COUNSEL ON
8 BOTH SIDES COULD HAVE CHOSEN TO HIRE EXPERTS AT A COUPLE
9 HUNDRED DOLLARS AN HOUR OR \$500 AN HOUR AND LET THEM WORK 100
10 HOURS OR 800 HOURS, AND THAT -- THAT KIND OF DISCREPANCY IS, I
11 THINK, THE REASON THE STATUTE GENERALLY DOESN'T ALLOW THAT.

12 NOW, THERE IS -- BASICALLY WHAT I TEND TO DO IS
13 GO STRICTLY BY THE STATUTE. THAT COULD ALLOW CERTAIN FEES FOR
14 WITNESSES AND EXPENSES AND THINGS LIKE THAT, BUT NOT
15 NECESSARILY FOR THEIR HOURLY FEE.

16 ANY POINT OF -- AND I'LL HAVE THE WRITTEN
17 JUDGMENT, ALTHOUGH I'M NOT GOING TO TRY TO REDUCE THIS OPINION
18 ON A RECORD FOR -- TO WRITING. I STATED MY REASONS, AND THE
19 JUDGMENT WILL BE ENTERED BASED ON THAT. IS THERE SOME ELEMENT
20 OR MOTION -- ALL MOTIONS, OTHER MOTIONS OTHER THAN -- I MISSED
21 ONE ON JMOL, PRECEDING MOTIONS AT THIS TIME WILL BE DENIED. IF
22 THERE'S SOME -- ONE OF THE JMOL MOTIONS, THERE'S SOME POINT
23 I'VE MISSED COVERING RIGHT NOW FROM PLAINTIFF'S POINT OF VIEW,
24 LET ME KNOW. IS THERE ANYTHING YOU THINK I'VE MISSED?

25 MR. ROBERTS: THAT'S ALL WE CAN THINK OF, YOUR

1 HONOR.

2 THE COURT: WHAT ABOUT DEFENDANTS? ANYTHING
3 THAT I'VE MISSED ON ANY OF YOUR JMOL'S OR OTHER MOTIONS, POST
4 TRIAL MOTIONS THAT I'VE MISSED?

5 MR. SAVIKAS: NO, YOUR HONOR.

6 THE COURT: ALL RIGHT. THEN ANY OF THE OTHER
7 PROCEDURAL MOTIONS AND SO FORTH AT THIS TIME ARE DENIED. AND I
8 WILL GO AHEAD AND GET THE JUDGMENT OUT AS QUICKLY AS WE CAN.
9 AT THIS TIME, THE COURT IS IN RECESS.

10 (COURT IS IN RECESS.)

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1 THE STATE OF TEXAS :

2 COUNTY OF JEFFERSON:

3
4 I, ADA V. CHRISTY, A CERTIFIED SHORTHAND REPORTER IN AND
5 FOR THE STATE OF TEXAS, DO HEREBY CERTIFY THAT THE FACTS AS
6 STATED BY ME IN THE CAPTION HERETO ARE TRUE; THAT THE ABOVE AND
7 FOREGOING CONTAINS A TRUE AND CORRECT TRANSCRIPTION OF ALL
8 PORTIONS OF EVIDENCE AND OTHER PROCEEDINGS REQUESTED IN WRITING
9 BY COUNSEL FOR THE PARTIES TO BE INCLUDED AND SAME WERE REDUCED
10 TO TYPEWRITING UNDER MY DIRECTION.

11 I FURTHER CERTIFY THAT I AM NOT, IN ANY
12 CAPACITY, A REGULAR EMPLOYEE OF THE PARTY IN WHOSE BEHALF THIS
13 PROCEEDING IS TAKEN, NOR IN THE REGULAR EMPLOY; AND I CERTIFY
14 THAT I AM NOT INTERESTED IN THE CAUSE, NOR OF KIN OR COUNSEL TO
15 EITHER OF THE PARTIES.

16 GIVEN UNDER MY HAND AND SEAL OF OFFICE, ON THIS, THE 10TH
17 DAY OF JULY, 2006.

18 

19 ADA V. CHRISTY, CSR, RPR, CCR
20 TEXAS CERTIFICATION NO.: 5141
21 EXPIRATION DATE: 12-31-07
22 8311 EARSEL LANE
23 ORANGE, TEXAS 77632
24 (409) 745-5228
25